STATE OF MICHIGAN

COURT OF APPEALS

THIDA HEIDINGER, a/k/a THIDA SAM, Plaintiff/Counter Defendant-Appellant,	UNPUBLISHED February 17, 2011
v	No. 299365 Washtenaw Circuit Court
MICHAEL ANTON HEIDINGER, Defendant/Counter Plaintiff-Appellee.	LC No. 07-00535-DM

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

In this child custody dispute, plaintiff-counter defendant-appellant (mother) appeals by right the trial court's denial of her request to appoint a receiver to sell the marital home and the denial of her motion to change the child's domicile to New York. We conclude that the parties' agreement did not require defendant-counter plaintiff-appellee (father) to sell the marital home, and that as such the trial court properly refused to appoint a receiver. We further conclude that the trial court properly applied the statutory factors in MCL 722.31(4) to deny appellant mother's motion for a change in the child's domicile. In addition, we conclude that the trial court properly applied the statutory best interest factors in MCL 722.23 to determine an appropriate modification of the parenting time schedule. Accordingly, we affirm.

I. FACTUAL BACKGROUND

The parties were married for six years, during which their daughter, Kira, was born. For most of the marriage, the family lived in Plymouth, Michigan, where father worked. Also living in the family was mother's older daughter, Tegan. The parties separated in 2006, when Kira was a preschooler and Tegan was in elementary school. Mother moved to Ann Arbor, and the parties alternated weekly parenting time by informal agreement. They subsequently signed a formal agreement (the Agreement) which stated that the parties would have joint legal custody of Kira, with equal parenting time. The Agreement also stated, "Dad will list the marital residence for sale on or before April 1, 2008" with a specified realtor. The trial court entered a consent judgment of divorce which incorporated the Agreement.

From 2008 through 2009, the parties apparently adhered to the agreed-upon alternating weekly parenting time, other than certain periods when one parent was out of the country. In

December 2009, mother remarried. The following May, her husband received a two-year postdoctoral fellowship at Columbia University in New York City. Mother and her husband leased an apartment in New York, and mother filed a motion to change Kira's domicile to New York. In her brief in support of the motion, mother informed the trial court that she, her husband, and Tegan would be moving to New York in the summer of 2010, and that mother was seeking permission for Kira to move with them and to live in New York. Mother proposed parenting time for father during the summer, some holidays and school breaks, and occasional weekends. Mother's motion did not seek a change in the legal or physical custody of Kira.

The trial court held evidentiary hearings on mother's motion. After the hearings, the court held an additional session, at which it issued its rulings from the bench. The court first determined that mother had failed to establish by a preponderance of the evidence that the change in domicile would improve the quality of life for the child and mother, as required by MCL 722.31(4)(a). Based upon that determination, the trial court denied mother's motion for a change in domicile. The trial court then proceeded to consider the best interest factors in MCL 722.23 with regard to the change in parenting time necessitated by mother's move. On the basis of the best interest factors, the court ruled that the child would live primarily with father during the school year, and primarily with mother during the summer, with holiday, school break, and weekend time divided between the parties. The court's order noted that the parties would continue to have joint physical and legal custody of the child.

II. ANALYSIS

A. Request for appointment of a receiver

Mother contends that the Agreement required father to sell the home. According to mother, the trial court impermissibly modified the Agreement by failing to appoint a receiver to sell the home. A settlement agreement in a divorce is construed as a contract. *Myland v Myland*, ___ Mich App ___, ___; ___ NW2d ___ (Slip op. No. 292868, November 23, 2010, at 4). "The existence and interpretation of a contract involves a question of law that this Court reviews de novo." *Id*., citing *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

A trial court may appoint a receiver in a divorce action to enforce a property settlement or a money judgment. *Shouneyia v Shouneyia*, ___ Mich App ___; ___ NW2d ___ (Slip op. No. 297007, January 18, 2011, at 5). We review a trial court's decision on a receivership request for abuse of discretion. *Id*. Appointment of a receiver is appropriate only in extreme circumstances to preserve and dispose of property under court order. *Id*., quoting *Reed v Reed*, 265 Mich App 131, 161-162; 693 NW2d 825 (2005).

The disputed provision in the Agreement states:

> Dad will list the marital residence for sale on or before April 1, 2008 with Tim Gilson at a price to be determined jointly by Dad and the Realtor. However the Realtor will seek input from Patty Stropes as to listing price. Adjustments to the listing price shall be made as necessary by Dad. If the sale of the house produces a gain the first $10,000 will be paid to Dad without contribution to Mom. Any

> gain above $10,000 will be divided equally at closing. Any loss will be accepted by Dad in full.

Father acknowledges that he did not fully comply with the Agreement. He listed the home for sale after April 1, 2008, and the listing agreement was with a realtor other than the realtor identified in the Agreement. That listing agreement expired without a sale of the home. The trial court ordered father to relist the marital home and to make every effort to sell the home. Father subsequently relisted the marital home, but that listing agreement expired without a sale. Father testified that Patty Stropes (referenced in the Agreement), had informed him that property values in the area had dropped and that he would be lucky to sell the home at a price of $130,000. Father further testified that there were two mortgages on the home and that a sale price of $130,000 would represent a significant loss.

The trial court ultimately ordered father to pay off and close the second mortgage by July 2012. The court also held father in contempt for "failing to diligently place the marital home on the market for sale, per this court's prior orders." The court ordered father to pay $600 to mother for the contempt. The court stated that the contempt amount would have been more, but for the court's order that father pay the round-trip costs of transporting the child to New York four times per year for mother's parenting time.

On the basis of this record, the trial court was within its discretion to refuse to appoint a receiver. The Agreement at issue required a payment from father to mother only in the event of a gain of more than $10,000 on the sale of the home. The record indicates that the likelihood of any gain on the sale of the home was slim. Rather, the record suggests that even if the court appointed a receiver, mother would receive no payment upon the sale of the home.

This Court must interpret the Agreement at issue as a contract and must apply the plain and ordinary meaning of the Agreement's terms. *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008). Nothing in the plain language of the Agreement required father to sell the marital home at any price. Rather, the Agreement required father to do three things: (1) to "list" the home for sale; (2) to determine the "listing price" by consulting with a specified realtor, with input from Patty Stropes; and (3) to adjust the listing price "as necessary." The remaining portions of the applicable paragraph pertain to the distribution of any proceeds in the event the home was sold. Neither the Agreement nor the terms of the court's order mandated the sale of the home at a loss.

B. Change of domicile motion

This Court identified the standard of review applicable to child custody issues in *Brausch v Brausch*, 283 Mich App 339, 347; 770 NW2d 77 (2009):

> Pursuant to MCL 722.28, this Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction. In a child custody context, an abuse of

> discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. Clear legal error occurs when a court incorrectly chooses, interprets, or applies the law. [Internal quotation marks and citations omitted.]

When deciding a change of domicile motion in which the parties have joint legal custody, the trial court must consider the statutory factors delineated in MCL 722.31.[1] *Spires v Bergman*, 276 Mich App 432, 436-437; 741 NW2d 523 (2007); *Brown v Loveman*, 260 Mich App 576, 590-591; 680 NW2d 432 (2004). In the present case, the parties indicate that the trial court must also identify the child's established custodial environment and must consider the statutory best interest factors of MCL 722.23.[2] Under the circumstances of this case, the trial court properly

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[1] The change of domicile factors, sometimes referred to as the *D'Onofrio* factors, are:

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
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> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [MCL 722.31(4).]

[2] The statutory best interest factors are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

first considered whether mother had established the statutory change of domicile factors by a preponderance of the evidence. See *Mogle v Scriver*, 241 Mich App 192, 203; 614 NW2d 696 (2000); see also *Brown*, 260 Mich App at 590-591.

Mother argues the trial court's findings on three of the change of domicile factors were against the great weight of the evidence. We disagree. The court determined that factor (a), the potential for improving the quality of life, favored father. The evidence supports the trial court's finding. Mother's husband acknowledged that his job in New York was a two-year appointment, albeit with a possibility of extension. Further, both Mother and husband acknowledged that mother had not yet found a job in New York, and that father's income would not fully cover the cost of living in New York. In contrast, the evidence indicated that the child was familiar with father's home in Plymouth, and that father had stable employment. The evidence further indicated that father had a sufficient income to cover living expenses for himself and for the child. Although father is a Canadian citizen, the trial evidence did not indicate that he was in danger of losing permission to continue working in the United States. This evidence was sufficient to allow the trial court to find that the move to New York would not improve the child's quality of life with regard to financial and geographic stability.

> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

The court found that the other change of domicile factors were inapplicable to its decision. Mother challenges these findings with regard to factors (b) (parent's compliance with parenting time schedule), and (c) (feasibility of modifying parenting time, and likelihood of compliance therewith). We conclude that the evidence was sufficient to support the trial court's findings.

Mother argues that father's opposition to the change in domicile was motivated in part by father's desire to defeat the equal parenting time schedule. Mother's argument has two flaws. First, the statute does not require the court to examine the non-moving party's motivation for opposing the change in domicile. The statute instructs the court to consider "whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule." MCL 722.31(4)(b). Here, father planned to maintain, not alter the child's legal residence, and accordingly, the trial court was not required to address father's motivation.

Second, to the extent father's motivation for opposing the motion was applicable to the trial court's decision, the evidence supported the court's conclusion that father was not attempting to frustrate mother's parenting time. Father acknowledged that his proposed parenting time schedule would result in the child spending somewhat more time in Michigan than in New York. He also acknowledged, however, the need for the child to spend time with mother. The record supports the trial court's finding that both parties had complied with and utilized their respective parenting time.

Regarding factor (c), mother argues that father refused to sell the marital home and move to Ann Arbor, which, according to mother, indicates that he would be unlikely to comply with a new parenting time order. Mother also argues that father's unwillingness to allow her to provide day care during his parenting weeks indicates that he would not comply with parenting time modifications. These arguments are unpersuasive. First, the evidence does not definitively indicate that father refused to move to Ann Arbor; rather, the evidence supports a finding that father was unwilling to sell the Plymouth home at a loss. Furthermore, mother provided no citation to an order or formal agreement that required father to allow mother to provide day care during his parenting weeks. The evidence indicated that both parties had complied with the parenting time orders. Accordingly, we find no ground to reverse the trial court's decision on the change of domicile motion.

C. Established custodial environment and best interest factors

A trial court may not modify an existing child custody order so as to change a child's established custodial environment "unless there is presented clear and convincing evidence that [the modification] is in the best interest of the child." MCL 722.27(1)(c); *Pierron v Pierron*, 486 Mich 81, 92-93; 782 NW2d 480 (2010). When considering the best interest of the child, the court must examine the statutory best interest factors listed in MCL 722.23. *Pierron*, 486 Mich at 92-93. An established custodial environment exists when "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

The parties indicate in their appellate briefs that the trial court should have considered the established custodial environment and the best interest factors with regard to the motion for change of domicile. Mother maintains that the trial court committed clear error by failing to specify the child's custodial environment. However, the record discloses no disagreement that mother's move would require a change in the alternating weekly parenting time arrangement, regardless of the court's order on mother's change of domicile motion. Although the trial court did not expressly identify the child's established custodial environment or whether mother's move to New York would alter the custodial environment, the court nonetheless applied the requisite best interest analysis in determining the necessary modification of the parenting time schedule. Accordingly, we find no clear error in the trial court's analysis.[3]

Assuming that the change in parenting time altered the child's established custodial environment, the statutory best interest factors governed the trial court's modification of the parenting time arrangements. See *Shade v Wright*, ___ Mich App ___; ___ NW2d ___ (Slip op No. 296318, issued December 2, 2010, at 8). A trial court must state findings and conclusions with respect to each best interest factor. *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008).

Mother contends the trial court committed clear error by failing to interview the child to determine her preference, pursuant to MCL 722.23(l). We disagree. A trial court's failure to interview a child can be harmless error, if the child's preference would not overcome the weight of the other best interest factors. See *Treutle v Treutle*, 197 Mich App 690, 696; 495 NW2d 836 (1992). The trial court noted that interviewing the six-year-old child would not be helpful to the court, because both parents had previously discussed the upcoming move with the child. The trial court's choice was at most harmless error. The court considered the other best interest factors and concluded that the child's best interest would be served by living with father during the school year. There is no indication in the record that the child's preference would have outweighed the other best interest factors. As this Court has noted, "[t]he child's preference does not automatically outweigh the other factors, but is only one element evaluated to determine the best interests of the child." *Treutle*, 197 Mich App at 694-695, citing *DeGrow v DeGrow*, 112 Mich App 260, 271; 315 NW2d 915 (1982).

Mother also argues that the trial court clearly erred by failing to make a finding on factor (h), the child's home, school, and community record. We disagree, for two reasons. First, the trial court stated on the record its assessment of the child's home, school, and community record. The trial court's statements demonstrate that the court found the child's environment in Michigan to be satisfactory. Although the court did not recite whether its assessment of the

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[3] Even if the trial court erred, the error would not require reversal. The record is sufficient for this Court to find that the child looked to both parents for guidance, discipline, the necessities of life, and parental comfort. The Court can thus determine that an established custodial environment existed with both parents. See *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000).

environment favored either party, the court's statements indicate that the court found the parties equal on this factor.

Second, even if the lack of a specific finding was error, the trial court obviously considered the factor with regard to the parenting time decision. The failure to make an express finding on factor (h) was thus, at most, harmless error. See *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994) (reversal is not required if appellate court finds error to harmless).

Mother asserts that the court's findings on several other factors were against the great weight of the evidence. We disagree. Regarding factor (c), the parties' capacity to provide for the child's material needs, the evidence supports the trial court's finding that, for the purpose of assigning parenting time, father had greater immediate wherewithal to provide for the child's needs during the school year.

As to factor (e), the permanence of the family unit, the evidence was sufficient to support the trial court's finding that father's home offered greater permanence than the proposed home in New York. Mother argues that the evidence of the sibling bond between Kira and Tegan established that the New York home would provide greater permanence for Kira. We disagree. The trial court was required to determine whether keeping the siblings together was in Kira's best interest, given the other facts that pertained to the permanence of the family unit. See *Foskett v Foskett*, 247 Mich App 1, 11-12: 634 NW2d 363 (2001). The evidence indicated that the siblings could maintain their bond through regular communication and through mother's parenting time.

Mother last argues that the trial court erred in finding the parties equal on factor (f), moral fitness, and on factor (j), the parties' ability to foster the child's relationship with the other parent. Regarding factor (f), our Supreme Court has explained:

> Factor f (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent.* To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* "who is the morally superior adult;" the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent.* [*Fletcher*, 447 Mich at 886-887 (emphasis in original).]

Mother contends that father secretly recorded various conversations, and that this conduct required the trial court to find that the moral fitness factor favored mother. To the extent that making a secret recording is a moral issue, father's testimony contradicted most of mother's allegations regarding his willfulness or intent in making the recordings. Moreover, the evidence of the recordings did not establish that father would engage in inappropriate or morally offensive behavior with the child. As such, the trial court could properly find that father's conduct did not affect his moral fitness as a parent.

With regard to the parties' ability to facilitate a close relationship with the other parent, the evidence indicates that the parties sporadically encountered difficulty being civil to each other after the divorce. The evidence also indicated that each parent had occasionally criticized the other parent, and that the parties disagreed as to whether mother should provide child care during father's parenting time weeks. However, there was no persuasive evidence that either parent attempted to withhold Kira from the other. As the trial court aptly stated, "these parents are divorced. They're not going to be the best friends." Given the equivocal evidence on factor (j), the trial court properly found the parties equal on this factor as it related to the court's modification of the parenting arrangement.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder